No. 83.

Brief of Wheeler for Appellee.

Filed Jan. 23, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 83.

CLIMACO CALDERON,
Libellant-Appellant,

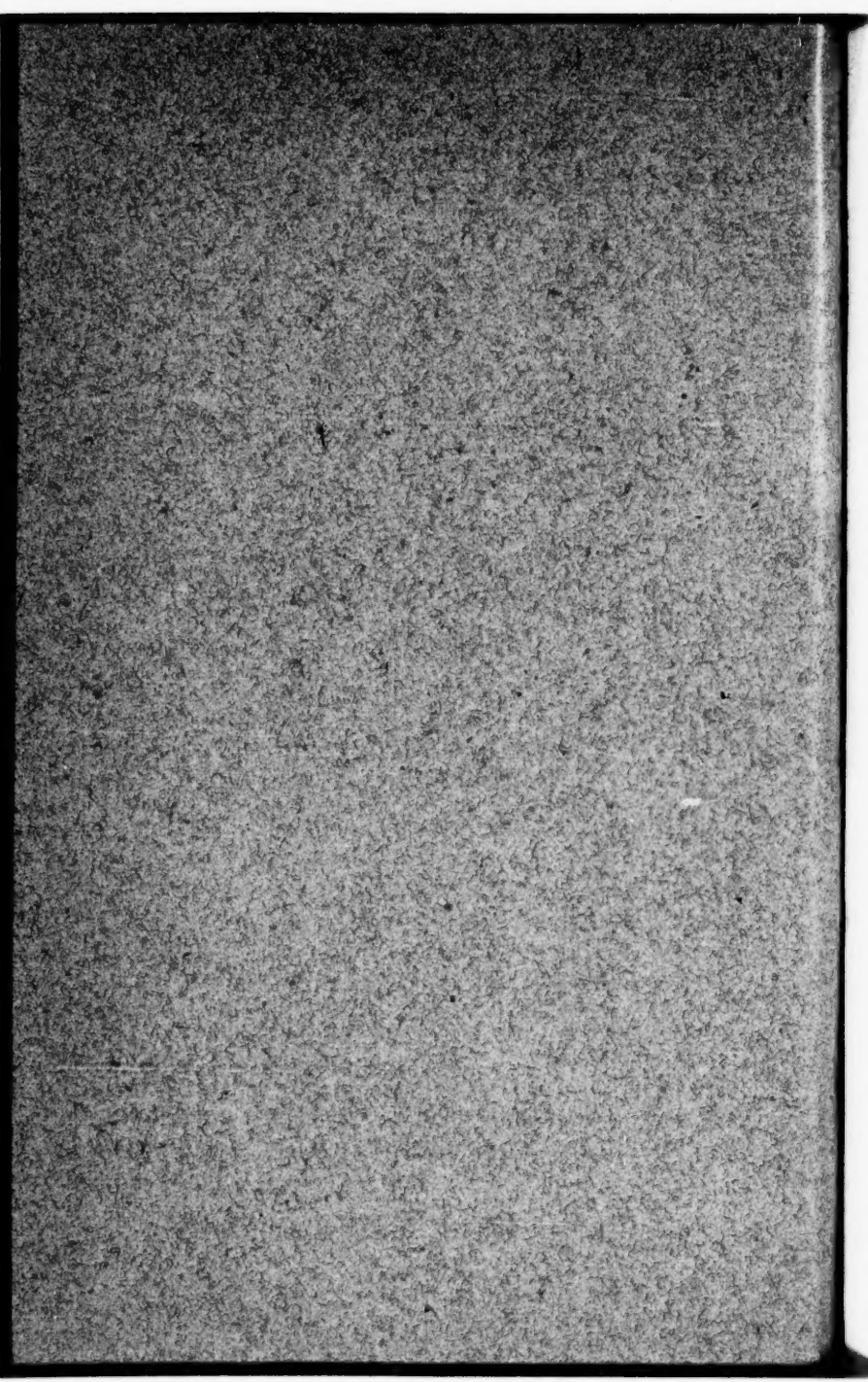
vs.

THE ATLAS STEAMSHIP COMPANY (LIMITED),
Respondent-Appellee.

Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR APPELLEE.

EVERETT P. WHEELER,
Of Counsel.



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CLIMACO CALDERON,
Libellant-Appellant,

vs.

THE ATLAS STEAMSHIP COMPANY
(Limited),
Respondent-Appellee.

Brief for Appellee.

Statement.

The libel alleges (p. 1) the delivery of twenty-six bales and three crates of duck uniforms to the Atlas S. S. Co. to be transported to Savanilla, and that libellant "received therefor three bills of lading, receipts and contracts, all of like tenor and date, whereof a copy is hereto annexed, marked A."

The bill of lading was put in evidence by libellant (p. 8, marginal page 14).

The steamer sailed July 19, 1893 (p. 23, marginal page 33). The goods were delivered between eleven and twelve o'clock of that day. They arrived too late to be put with the other Savanilla cargo. "It was just the last minute. * * * They were the last goods put in" (p. 25).

On the delivery of the goods a receipt for them was given "subject to the conditions expressed in the company's form of bill of lading" (Ex. 3, p. 30). Libellant received the bills of lading "not later than one o'clock,

and forwarded them by the same steamer" (p. 24, marginal page 34).

Libellant had shipped goods, at least, ten times on similar bills of lading (p. 14).

The Atlas steamers had been running on the same route to Carthagena and Savanilla, and on the same schedule for about three years (p. 13, marginal page 21). The usual course of that route was "first to Kingston, then to Savanilla, then to Carthagena and Port Limon, and then back to New York direct" (pp. 13, 14; p. 9). On that route the steamers carry cargo, passengers, specie and mails (p. 14).

The mistake in not delivering the bales of uniforms at Savanilla was not discovered until after the steamer had left that port, and about an hour before the discharge of Carthagena cargo (p. 16, fol. 62; p. 18, fol. 71 and 72; p. 19, fol. 74). The cause of the mistake was that the cases had been "stowed amongst the Carthagena cargo" (pp. 9, 10, 11).

The bales could not be landed at Carthagena because the law there does not allow the landing of cargo not on the manifests, and it was impracticable to forward the goods from there (p. 10). The steamer could not return to Savanilla, because she was "timed to be at Limon at a certain day to take up a perishable cargo that was waiting" (p. 10, marginal page 17).

The steamers have regular sailing days from these different ports. The return cargo at that season from Port Limon is bananas, and punctuality in sailing on the schedule time is, therefore, essential (p. 17).

POINTS.

First.

The question which appellant argues in this case cannot

be raised upon the record. He introduced no evidence tending to show that the goods in question were worth more than one hundred dollars per package, which is the amount of the recovery. The record, especially the opinion of the District Judge (pp. 31 to 35), shows that the respondent in the District Court contested the claim altogether. It was argued there, on the authority of

Railroad Co. *vs.* Reeves, 10 Wall, 176

and other cases cited by the District Judge (p. 34) that inasmuch as the proximate cause of the loss of the goods was a hurricane, which was obviously a peril of the sea; the plaintiff was not entitled to recover, although remotely the failure to land the goods at Savanilla occasioned the loss. This contention was overruled by the District Judge, who made a decree in favor of the libellant for $2,900.

No new evidence was introduced in the Circuit Court. This Court has recently held, in the case of

The *Majestic*, 166 U. S., 375,

that the Circuit Court of Appeals was right in refusing to allow additional evidence to be taken in that case. The Court will remember that it appeared distinctly on the record that the practice in the Second Circuit had been changed in this respect just prior to the year 1892, and that unless in very exceptional cases, no new testimony would be allowed in that Court. An inspection of the record in The *Majestic*, which was returned on the certiorari for diminution of record (pp. 2 to 13) will show how strong a case was made for the introduction of additional testimony. Yet this Court approved the action of the Circuit Court in refusing it. How much more must this rule be applied in a case like the present, in which no application whatever was made for leave to take additional

testimony. The decree must necessarily be confined to the facts put in evidence in the District Court.

If, however, the Court should for any reason infer that the goods in question were worth more than $2,900, we submit the following in support of the decree of the Circuit Court of Appeals:

Second.

Bill of Lading, a Contract.

The bill of lading delivered by the respondent to the libellant, which is alleged in the libel (p. 1), and of which a copy is annexed thereto (pp. 3 to 7), and which was put in evidence by him (p. 8, marg. page 14), constituted a contract between the parties, and is the sole evidence thereof.

The *Delaware*, 14 Wall., 579.

In that case it was held that parol evidence was not admissible to contradict the bill of lading. This was a clean bill of lading, containing no permission to carry goods on deck, and evidence of an oral agreement that the goods might be carried on deck was rejected. At page 601 the Court say:

"Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge the payment or delivery, it, the receipt, is merely *prima facie* evidence of the fact, and not conclusive, and therefore the fact that it recites may be contra-

dicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing. and cannot be contradicted or varied by parol evidence. Text writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between carrier and shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts."

As this Court said in the *The Caledonia*, 157 U. S., 124, 139 :

"We agree with the Circuit Court that the bill of lading can alone be considered as the contract between the parties, the memorandum being preliminary merely."

S. P. Bedell *vs.* Richmond & Danville R. R., 94 Geo., 22.

The same rule is applied to inland bills of lading.

Garden Grove Bank *vs.* Humeston, &c., Ry. Co., 67 Iowa, 526.

Hill *vs.* Syracuse B. & N. Y. R. R., 73 N. Y., 351.

Germania Fire Ins. Co. *vs.* Memphis & Charleston R. R., 72 N. Y., 90.

This bill of lading is one of the best known of commercial instruments.

It has become quasi negotiable.

Conard *vs.* Ins. Co., 1 Peters, 386, 445.

Pollard *vs.* Reardon, 21 U. S. App., 639 ; 13 C. C. A. 171 ; 65 Fed. Rep., 848.

It is one of the most common securities upon which money is raised. It may be said without contradiction that half the grain and cotton crops of the United States are marketed by means of money borrowed upon security of bills of lading. An instance of this is the case last cited. The Court say (p. 533):

"An assignment of a bill of lading operates as a transfer of a title to the property therein described. As is said in Meyerstein *vs.* Barber, L. R., 2 C. P., 45: 'While the goods are afloat it is common knowledge, and I would not think of citing authorities to prove it, that the bill of lading represents them; and this indorsement and delivery of the bill of lading, while the ship is at sea, operates exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do.'"

This practice is mentioned as long ago as 1821, in Faith *vs.* East India Co., 4 B. & Ald., 630, 632, 633.

In Friedlander *vs.* Texas & Pacific R. R. Co., 130 U. S., 416, this Court uses the following language respecting the bill of lading:

"It is true that while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances, but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery."

An instrument possessing such properties is certainly a distinct advantage to the recipient. This is recognized by the Harter Act, which in express terms (Section 4) makes it the "duty of the owner or owners, master or agent of any vessel transporting merchandise or property from or between the ports of the United States and foreign ports, to issue to shippers of any lawful merchandise a bill of lading."

Act Feby. 13, 1893, 27 U. S. Stat., 445.

Third.

Validity Clause of Limitation.

1. It is well settled that a clause in a bill of lading, limiting the amount of the recovery to a specified sum per package, is valid.

Hart *vs.* Pennsylvania R. R., 112 U. S., 331.

At page 340, the Court say :

" There is no justice is allowing the shipper to be paid a large value for an article which he has induced the carrier to take, at a low rate of freight, on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss ; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value in this case stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

In that case there was no definite valuation of the horses in question. The clause in controversy read :

" The carrier assumes a liability on the stock to the extent of the following agreed valuation :
" If horses or mules, not exceeding $200 each."

This could not be called a valuation of a particular horse. It fixed nothing but the limit of liability. The carrier could have proved that the animal was worth less than the amount stated.

At page 340 of the Hart case, the Court continue :

" The limitation as to value has no tendency to exempt

Kidd *vs.* Greenwich Ins. Co., 35 Fed. Rep., 351.

The Bermuda, 29 Fed. Rep., 399; aff'g S. C., 27 *Ibid.*, 476.

The Denmark, 27 *Ibid.*, 141.

Green *vs.* Boston & Lowell R. R., 128 Mass., 221.

Duntley *vs.* Boston & Me. R. R., 66 N. H., 263.

Brehme *vs.* Adams Ex. Co., 25 Md., 328.

Richmond & Danville R. R. *vs.* Payne 86 Va., 481.

Louisville & Nashville R. R. *vs.* Sherrod, 84 Ala., 178.

Railway Co. *vs.* Weakly, 50 Ark., 397.

Zouch *vs.* Ches. & Ohio R. R., 36 W.Va., 524.

The validity of a similar and much more onerous clause in a telegraph blank was sustained in Primrose *vs.* Penn. R. R., 154 U. S., 1. At p. 15 the Hart case is quoted and approved.

The validity of a similar limitation in contracts for the carriage of passengers and their baggage is equally well settled.

Railroad Co. *vs.* Fraloff, 100 U. S., 24, 27.

There is no distinction on principle between these cases and the one at bar. They all rest on the solid foundation of allowing parties to define the limit of an undefined liability. Market value is always an uncertain quantity. The place of ascertainment is often in doubt, and it must always rest on evidence as to quality, which the shipper alone can give; and which ordinarily the carrier cannot refute.

In Alair *vs.* Northern Pacific R. Co., 53 Minn., 160, the Court say (pp. 166, 167):

"So far as the question now under consideration is concerned, we see no difference between a case like the present, where the stipulation is that the value of the property does not *exceed* a specified sum, and one where the value is stipulated *to be* a specified sum; also that it makes no difference whether the valuation expressed in the contract is one previously named by the shipper on requirement of the carrier, or one inserted in the contract by the carrier, without being named by the shipper, but acquiesced in by him. In either case it becomes a part of the contract on which the minds of the parties meet, and on which they act. Also, if the purpose of the stipulation is a lawful and proper one, the mere fact that it may incidentally have the effect of limiting the amount of the carrier's liability in case of loss caused by negligence, will not render it invalid. * * * Assuming, as we must, that the contract was fairly made for the purposes expressed in it, we think it ought to be upheld as just and reasonable. It is not in any proper sense a contract for exemption from the consequences of negligence."

S. P. Douglas Co. *vs.* Minnesota Transfer Co., 62 Minn., 288.

3. The amount of the limitation—one hundred dollars per package—is certainly reasonable, especially in view of the low charge of one dollar and thirty-four cents for transporting that package four thousand miles.

4. Similar clauses are held by the House of Lords to be just and reasonable, under the Railway & Canal Traffic Act, 1854.

Great Western R. Co. *vs.* McCarthy, 12 App. Ca., 218.

Railway Co. *vs.* Brown, 8 *Ib.*, 703.

The language of Lord Fitz Gerald in the latter case (p. 722) is applicable to this.

"Why should the plaintiff be relieved from the contract

he has deliberately accepted? There was full and ample consideration, there is an absence of any fraud, and he has not been overreached. He elected to send his goods at the lower rate—the alternative offered to him was fair, and I can discover no ground on which we can treat this contract as a fraud upon the statute or relieve the plaintiff from its consequences."

Fourth.

Incorporation of Indorsement.

It is equally well settled that the clauses printed on the back of the bill of lading in this case form a part of it, because they are, by express language, incorporated in it and are signed by the agents for respondent. The question is not of mere indorsement but incorporation by reference.

Record, p. 3 (Marg. p. 5); p. 6 (Marg. p. 9); Clauses, 1, 9.

1. It is not to be supposed that the Courts intend to apply to carrier's contracts any different rule from that applicable to other contracts, so far as the question of what is to be treated as part of the contract is concerned.

If the carrier delivers to the shipper an instrument which is evidently intended as a whole, and which is obviously not a mere receipt, but is intended to embody a statement of the entire terms of the contract, it seems irrelevant to the inquiry as to what the contract is, whether a particular clause is printed on the back or on the face, or whether there are two pages or only one. The question is—Was the indorsement referred to in the body of the contract, and incorporated therein, by such reference?

The libellant cites expressions of Mr. Justice Davis in Railroad Co. *vs.* Manufacturing Co., 16 Wall., 318, to the effect that certain indorsements upon a carrier's receipt were not to be regarded. In that case the character of the instrument delivered by the carrier to the shipper was essentially different from that in this. It was a mere receipt, and not a contract. It was expressed to be "subject to the rules and regulations established by the company, a part of which notice is given on the back hereof." There was nothing in this to indicate that the matter printed upon the back was any more than a regulation as to the manner of doing business. Judge Davis draws special attention to the fact that it was not signed by the carrier, and calls it a mere notice.

It did not appear that the shipper had ever shipped goods under a similar receipt, nor is there anything to show whether any question on this subject was submitted to the jury.

The receipt had no characteristic of a bill of lading. On the contrary it contained the following words: "This receipt is not transferable."

In short, the case is placed by the Court wholly on the ground that the receipt was not a contract and that the carrier could not altogether exclude his liability by a notice. In both essential particulars it differs from the case at bar. That decision must be compared with

Myrick *vs.* Michigan Central R. R. Co., 107 U. S., 102.

In that case the paper delivered to the shipper was a mere receipt for cattle "for transportation by the Michigan Central Railroad Company, to the warehouse at ." On the margin was the following:

"This receipt can be exchanged for through bill of lading.

NOTICE.—See rules of transportation on the back hereof."

On the back of the receipt the rules were printed, one of which (the 11th) contained a stipulation:

"The company will not be liable or responsible for any loss, damage or injury to the property after the same shall have been sent from any warehouse or station of the company."

At page 108 the Court say:

"Though this rule brought to knowledge of the shipper might not limit the liability imposed by a specific through contract, yet it would tend to rebut any inference of such a contract from the receipt of goods marked for a place beyond the road of the company."

The decision was followed and approved in

North Penn. R. R. *vs.* Commercial Bank, 123 U. S., 727.

2. The decision of this Court in the case of *The Majestic*, 166 U. S. 375, must control this. In that case the Court decided that a notice printed on the back of a passenger ticket was not binding upon the passenger, because his attention was not called to it, and it formed no part of the contract. The Court say, p. 381:

"By the contract in this case the Steamship Company agreed to land libellants with their luggage at the port of New York, and none of the alleged exceptions or conditions were referred to therein. They were notices and nothing more, and it cannot be held as matter of law that whether they were regulations for the conduct of business or limitations upon common law obligations, they constituted any part of the contract."

The Court quote with approval (p. 384) the following passage from Wheeler on the Modern Law of Carriers, 263:

" A notice or memorandum, even though printed upon the bill of lading or other contract of the carrier, *unless referred to in the body of the contract.* and thus made a part of it, is no more than a notice, and does not form a part of the contract between the shipper and the carrier."

At page 385 the Court add :

" On the evidence we are unable to conclude that the libellants should be held bound, as matter of fact, by any of the alleged conditions or limitations. They were not included in the contract proper in terms *or by reference.*"

In the case at bar the bill of lading on its face, by express terms, incorporates the conditions printed on the back. These were simply printed there so as to enable them to be printed in larger type, and to prevent the bill of lading itself from becoming too cumbersome. The following is the clause upon the face of the bill of lading. (Record, p. 3):

" In accepting this bill of lading the shipper, owner, and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions as written on the back hereof, whether or printed, as fully as if they were all signed by such shipper, consignee, owner or holder."

It contains on its face no specification of exemption of any kind. Libellant testifies that he surrendered the shipping receipts and accepted the bill of lading in exchange (p. 24). The form of these shipping receipts is printed on page 30. Both of them acknowledge the receipt of the uniforms in question " subject to the conditions expressed in the company's form of bill of lading."

3. The bill of lading was issued after goods were shipped, but the shipping receipt expressed that the goods were received on the terms stated in the bill of lading.

This of itself was sufficient to constitute a contract to carry on these terms.

Wilde *vs.* Merchants' Desp. Trans. Co., 47 Iowa, 272.

The practice of giving a shipping receipt with the understanding that it is to be exchanged for a bill of lading is of long standing.

Craven *vs.* Ryder, 6 Taunt, 433.
Thompson *vs.* Traill, 2 C. & P., 334.

But this question does not arise in the case at bar.

No issue is made by the pleadings on the acceptance of the bill of lading. It is alleged in the libel and was proved by the libellant. The contention in his brief, that there was no express evidence of his assent, is, therefore unwarranted by the pleadings, and cannot be made here. In this respect it resembles the Hart case, 112 U. S. 331, 343.

4. Libellant cites expressions in the opinion in Ayers *vs.* Western R. R., to the effect that "an explicit agreement" on the part of the shipper must be proved. This decision is not controlling here.

(*a.*) This case was decided solely on the authority of Railroad Company *vs.* Manufacturing Co. That decision has since been limited as before shown, and never applied to limitations of amount.

(*b.*) The admission in the libel and the statement in the shipping receipt that the goods were received subject to the conditions in the bill of lading, distinguish that case from the one at the bar.

(*c.*) The more recent case of Quimby *vs.* Boston & Maine

R. Co., 150 Mass., 365, holds that a reference in the body of a pass to conditions indorsed, incorporates them.

S. P. Collins *vs.* Bristol & Exeter R. Co., 11 Excheq., 790.

J. J. Douglass Co. *vs.* Minn. Transfer Co., 62 Minn., 288 ; S. C. 30 L. R. A., 860.

The Henry B. Hyde, 82 Fed. Rep., 681.

5. It is well-settled law that an instrument which on its face makes an express reference to another, incorporates that other as fully as if it had been embodied in the first.

This is only an application of the maxim "*Certum est quod certum reddi potest.*"

Broom Legal Maxims, 580 (6 Eng. Ed.) 625 (8 Am. Ed).

In Bayne *vs.* Wiggins, 139 U. S., 210, this Court say (p. 215):

"This letter of the defendant's agent, read in connection with the other writings which had passed between the parties, unequivocally refers to the first deed, which fully described the land sold, and to the money and notes to be given in payment therefor, as specified in the letter which inclosed that deed. In the light of the undisputed facts its language could apply to nothing else. It thus, by necessary reference, embodies a definite statement of the contract actually made by the parties, both as to the property to be conveyed, and as to the terms of payment, and, taken together with that deed and that letter, constitutes a sufficient memorandum, signed by both parties on their agents, to take the case out of the Statute of Frauds."

To the same effect are:

Beckwith *vs.* Talbot, 95 U. S., 289.

Ridgway *vs.* Wharton, 6 H. L. Cas., 238.

Owen *vs.* Thomas, 3 Mylne & K., 353.
Freeland *vs.* Ritz, 154 Mass., 257.
Raubitschek *vs.* Blank, 80 N. Y., 478.

The terms of a bill of lading are incorporated in a contract indorsed on it and signed by parties.

Putnam *vs.* Wood, 3 Mass., 481, 485.

And where verbal contract of insurance is made it incorporates (by implication of law) the terms usual in such insurance.

Salisbury *vs.* Hekla Fire Ins. Co., 32 Minn., 458.

6. In Primrose *vs.* Western Union Tel. Co., 154 U. S., 1, this Court held that the following language was sufficient to incorporate as part of the contract between the sender of a telegram and the telegraph company the clauses printed on the back of the telegraph blank.

On the face was the following language:

"Send the following message, subject to the terms on back hereof, which are hereby agreed to."

The printed sentence was not signed by the sender. It is true that the message below was signed, but this was not the clause which incorporated the terms endorsed. Below the signature of the sender of the message was the following:

"Read notice and agreement on back of this blank."

This Court held that the printed terms endorsed upon the blank were binding upon the sender and limited his right of recovery to the amount paid for transmission, $1.15, although the actual damages were upwards of $20,000.

In the case at bar the incorporation of the conditions printed on the back is far more obvious. They are twice referred to distinctly and specifically in the body of the bill of lading.

Fifth.

Acceptance by Shipper.

It is well settled that the acceptance by the shipper of a bill of lading is conclusive evidence of his agreement to its terms.

York Co. *vs.* Central R. R., 3 Wall., 107.

In this case it was proved (p. 108) "that the cotton was shipped on the steamer before the bills of lading were signed; that the shipper had not examined the bills; that his attention was not called to the fire clause, and that his firm had no authority to ship for their principals with that exemption." It was also argued that there was no consideration for the exemption. But the Court overruled all the objections, and held that the plaintiff, who was the owner of the goods, was bound by the exemption in the bill of lading.

1. Evidence of express assent by the shipper to the terms of the bill of lading is unnecessary. In the case at bar, Calderon does not testify that he did not read it, or did not know its terms. But if he had so testified, he would equally be bound by the contract.

York Co. *vs.* Central R. R., 3 Wall., 107.
Kirkland *vs.* Dinsmore, 62 N. Y., 171.
Farnham *vs.* Camden & Amboy R. R., 55 Penn., 53.
Belger *vs.* Dinsmore, 51 N. Y., 166.
Grace *vs.* Adams, 100 Mass., 505.

In the latter case the Court say:

"It is not claimed that the shipper did not know that the receipt was a contract or a bill of lading. It was his duty to read it."

In

Snider *vs.* Adams Ex. Co., 63 Mo., 376,

the Court say:

"The instrument showed on its face that it was not merely a receipt. * * * It was his duty to read it."

S. P. Mulligan *vs.* Illinois Central R. Co., 36 Iowa, 181.

The shipper is presumed to assent to its conditions, because he receives it under circumstances which, by the ordinary usages of business, would naturally lead him to infer that the document he receives, which is his muniment of title, quasi negotiable, and on the face of which he may borrow money, is a contract and not a mere receipt.

Cases before cited, and

Hoadley *vs.* Northern Trans. Co., 115 Mass., 304.

Long *vs.* New York Central, R. R., 50 N. Y., 76.

Am. Ex. Co. *vs.* Second Natl. Bank, 69 Penn., 394.

In Belger *vs.* Dinsmore, 51 N. Y., 166, reversing S. C., 51 Barb., 69, the Court held that the presumption of law was that a party receiving and accepting an instrument in any business (in this case an express company's receipt) is acquainted with its contents and assents to its terms.

Kirkland *vs.* Dinsmore, 62 N. Y., 171.

2. The case of Richardson *vs.* Rowntree, (1894): A. C., 217, cited in the opinion in the *Majestic*, is plainly distinguishable from the case at bar. In that case the jury found that plaintiff "did not know that the writing or printing contained conditions relating to the

terms of the contract of carriage." The House of Lords held that there was evidence sufficient to warrant this finding, and that the mere delivery of the ticket, which the person receiving it did not know to be a contract, would not bind a recipient by the terms printed upon the paper.

In the case at bar it cannot be claimed for a moment that the appellant did not know that the bill of lading delivered to him expressed the contract between him and the carrier. He alleges it in his libel, and annexes a copy of it thereto (p. 1).

Respondent proved that libellant had shipped goods under similar bills of lading several times, probably ten (p. 14). He was subsequently called and testified (p. 23), and does not deny that he had frequently shipped goods on similar bills of lading. This evidence, uncontradicted, is sufficient to require a finding of actual assent on his part.

Van Schaack *vs.* Northern Trans. Co., 3 Bissell, 394.

The decision of this Court in Hart *vs.* Pennsylvania R. R. Co., 112 U. S., 3, 331, is in point. At page 343, the Court say :

"The plaintiff did not, in the course of the trial, or by any request to instruct the jury, or by any exception to the charge, raise the point that he did not fully understand the terms of the bill of lading, or that he was induced to sign it by any fraud or under any misapprehension. On the contrary, he offered and read in evidence the bill of lading, as evidence of the contract on which he sued."

Libellant gave no testimony tending to show that he did not fully understand the terms of the bill of lading, or that he was induced to accept it by any fraud or under any misapprehension. In this as in the Hart case, he

offered and read in evidence the bill of lading as evidence of the contract on which he sued.

3. A signature by libellant was unnecessary. In the Delaware and the other cases cited under the Second Point, the bill of lading was not signed by the person receiving it. It is matter of common knowledge that in the case of maritime bills of lading it has never been the practice for the shipper to sign the document delivered to him by the carrier.

Very careful research has failed to disclose a single instance in any reported case under maritime bills of lading, where the document has been signed by the shipper.

In Quimbey *vs.* Boston & Maine R. R., 150 Mass. 365, it was held that the terms indorsed on a free pass, and incorporated by reference thereto on the face of the pass were binding on the passenger accepting the same, although he did not sign them, and although it was intended that he should. The Court say:

"Having accepted the pass he must have done so on the conditions fully expressed therein, whether he actually read them or not."

The Judges of the Court below did not differ as to any of the questions which have thus far been discussed. Judge Wallace's dissent was wholly on the construction of a particular clause in the bill of lading.

Sixth.

Construction Bill of Lading as to Amount.

Appellant argues that the clause in question means that the carrier should not be liable *in any amount* for a package worth over $100 "unless bills of lading are signed

therefor, with the value therein expressed, and a special agreement is made."

1. If the clause did mean this it would still be valid. This was expressly adjudged by Mr. Justice Blatchford, in the Second Circuit, on appeal, and has twice been held in the District Court for the Southern District.

The *Bermuda*, 29 Fed. Rep., 399; aff'g S. C., 27 *Ibid*, 476.
The *Denmark*, 27 *Ibid*, 141.

2. But we cannot admit that the clause is open to the construction contended for. It provides that the "carrier shall not be liable for gold * * or for goods of any description, which are above the value of $100 per package unless," etc.

If gold, which is exempted by name, were put in the same package with other articles, no one would claim that the others were exempt. The gold only would be excluded. So when goods making the value over $100 are packed with goods of that value, the latter are not exempt. The former are.

Where goods are exempted by description, that description is exempt. When they are exempted by value, all over the value specified, are exempt. But how can it be said that the parties intended to exempt goods which were worth less than the specified value? The case is not one of a single article, but of numerous uniforms, packed in each bale or package.

The decree below charged the appellee with no liability for any goods in each package which were "above the value of $100 per package."

3. If the clause is ambiguous, it should be construed *ut res magis valeat quam pereat.*

4. The clause referred to is, in effect, a valuation of the goods, as shown under the Seventh Point.

Seventh.

Construction of Bill of Lading as to Negligence.

The dissenting opinion of Judge WALLACE thus states the rule on this subject (p 40):

"General words exempting him (the carrier) from liability under particular circumstances, do not protect him from the consequences of his own negligence."

1. The learned Judge states the rule correctly as applied to cases where the contract is to exempt the carrier altogether from liability. But the rule as laid down by him is not applicable to cases where the agreement is a diminution of the amount of liability, in accordance with the rate charged for transportation and not an entire exemption.

In Hart *vs.* Pennsylvania R. R. no mention was made in the bill of lading of a loss from negligence on the part of the carrier. The real reason for the rule on this subject is thus stated by this Court in that case (p. 337):

"It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. * * It is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation."

The language of the bill of lading in the case at bar does not differ in any important respect from that in the Hart

case. The freight is $39.43, or about $1.34 per package. This is the sole consideration for the contract, which expressly provides that the goods shall be "subject throughout the entire transit, and while the goods are in the custody of the carrier, to the terms and conditions stated in this bill of lading."

Here, then, as in the Hart case, the presumption is conclusive that if the liability had been assumed on an unlimited valuation, as now urged, a higher rate of freight would have been charged. The word "value" is certainly as strong as the word "valuation." The bill of lading having provided that the particular twenty-nine packages shipped under it should be subject to the terms and conditions stated in the bill of lading, and one of these terms being that a special agreement is to be made "for goods of any description which are above the value of $100 per package," and no such agreement having been made, nor any greater value therein expressed, it is manifest that the shipper, in effect, stated to the carrier that the goods in question did not exceed this value. By omitting to ask for a special agreement and by failing to make a special statement of value, he in effect asserted that the value was not over $100.

To the same effect are

Graves *vs.* Lake Shore & M. S. R. R., 137 Mass., 33.

Ballou *vs.* Earle, 17 R. I., 441.

Richmond & Danville R. R. *vs.* Payne, 86 Va., 481.

Douglas Co. *vs.* Minn. Transfer Co., 62 Minn., 288.

2. Judge Wallace cites Magnin *vs.* Dinsmore, 56 N. Y., 168, in support of the rule laid down by him. But he does not advert to the fact that on a subsequent appeal the

Court of Appeals distinctly held that this rule does not apply to a case like the present.

Magnin *vs.* Dinsmore, 62 N. Y., 35.

This was reiterated on the final appeal.

S. C., 70 N. Y., 410.

The case of Westcott *vs.* Fargo, 61 N. Y., 542, also cited by him, *holds* (p. 553) that the point which was afterwards raised on these latter appeals in Magnin *vs.* Dinsmore, was not raised on the trial of the Westcott case. This is in effect that when a carrier delivers a special acceptance, limited as to the amount of liability, it is a fraud in law if the shipper omit to state the actual value, and he cannot, therefore, recover for a value beyond the amount specified in the bill of lading.

3. The House of Lords, in construing a contract under the Railway and Canal Traffic Act of 1854, give to it the construction now contended for.

Railway Co. *vs.* Brown, 8 App. Ca., 703, 709.

Eighth,

Reformation of Contract.

If the bill of lading be a contract it is plain that it can be reformed by the Court only under the same circumstances as other contracts. What the libellant is really seeking to do in this case is to reform the bill of lading. If it bear the construction which has been contended for, as plainly it does, and if the clause containing this construction be lawful, as this Court held it was in the Hart case, the clause can only be stricken out of the

contract upon evidence "clear, unequivocal and decisive;" "so clear and convincing as to leave no room for doubt." To use the language of this Court in

Howland *vs.* Blake, 97 U. S., 626,

"If the proofs are doubtful or unsatisfactory, if there is a failure to overcome the presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties."

To the same effect are

Baltzer *vs.* Railroad Co., 115 U. S., 645.
United States *vs.* Munroe, 5 Mason, 572.
Christopher and Tenth Street R. Co. *vs.* Twenty-third Street R. Co., 145 N. Y., 51.
Ivinson *vs.* Hutton, 98 U. S., 79.

At p. 83 the Court say:

"Courts of equity possess the power to correct mistakes in written instruments even to the extent of changing the most material stipulations which they contain and which are the subjects of special agreement, but the settled rule of practice is that the power should always be exercised with great caution and only in cases where the proof is entirely satisfactory."

So far from there being such evidence in the case at bar, there is no evidence at all that the written contract does not express correctly the actual agreement.

Ninth,

Harter Act.

1. The Carriers' Act of February 13, 1893, known as the

Harter Act (27 Stat., 505), does not affect the validity of stipulations limiting the amount of recovery, or making it the duty of shippers to disclose the value or character of goods. The object of all such clauses is to compel fairness on the part of the shipper. The "Carrier's reward ought to be proportionable to the risk."

Gibbon *vs.* Paynton, 4 Burr, 2298; cited and approved,
Hart *vs.* Penn. R. R. Co., 112 U. S., 331, 341.

The amount of this reward is not touched by the Harter Act, and, therefore, the amount of the recovery is not.

That Act was passed in order to establish beyond controversy the validity of certain clauses in bills of lading, and the invalidity of others. On these points there was a distressing conflict of authority which is now ended. There is nothing in its language or its history which tends to show that it was intended to abrogate the reasonable limitation of the amount of liability, in proportion to the risk and the reward.

No complaint was made by shippers on this point. The actual grievances which led to the passage of the Harter Act are so fully stated in the brief in the *Carib Prince*, submitted herewith, that it is needless to repeat them. We do, however, draw special attention to the fact that the same Court which, in Railroad Co. *vs.* Lockwood, held a stipulation to be void which altogether exempted the carrier from liability for the negligence of his servants, in the Hart case sustained the validity of a limitation as to amount, although the loss in that case was caused by negligence. The distinction between the two classes of cases was well recognized before the introduction of the Harter Act.

"Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this

the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the legislative body."

Holy Trinity Church *vs.* United States, 143 U. S., 457, 463.

This is made even clearer by a comparison between the Act as it passed the House (24 Cong. Rec., Part 1, p. 147) and as it passed the Senate (*Ibid*, Part 2, p. 1180). The first section, so far as it relates to this subject, originally read:

"Nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom."

It was amended to read:

"That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

The distinction between exemption from liability and a limitation thereof is clearly shown by this comparison. The bill originally prohibited both. As amended it prohibits the former and not the latter. The amendment could have no other object.

2. The Hart case, as above stated, shows the reasonableness of the position contended for. The more valuable the goods the more care has to be taken of them and the higher the rate of transportation has to be. The Courts

must recognize the rights of carriers to say that they will only take property of great value at a high rate of freight in order to compensate them for the heavy liability which they assume if the goods are lost. Carriers are influenced by exactly the same facts which determine the rate of premiums in insurance policies. If they are insurers they are entitled to an adequate premium. The question is what is the amount insured and what the risk? When these are known the rate follows. When a loss occurs the insured can only collect the amount for which his policy was issued, no matter what the lost property was worth. The insurance company pays only the risk which it assumed—no more. The present case is exactly analogous.

The Atlas SS. Company represented, by its bill of lading, that it was willing to accept any goods of a value up to $100, and make itself responsible for the careful transportation of them for a *fixed rate*. If the shipper wanted the company to be liable for more than $100, it was his business to state the value at the higher figure and pay accordingly for the risk assumed. He did not see fit to do so, however, but paid freight upon a basis of valuation of $100. When a loss occurs he attempts to say that the property was worth more than the value fixed. The company has a right to reply with the insurance company, "You can only collect the amount of the risk which you paid us to assume."

The practice of regulating the amount of care to be bestowed upon property by its value, and by the consequent price paid for the extra care, is illustrated in all branches of business.

If a man wants to express diamonds he must state their value and pay accordingly. The express company then has notice of the value of the package, is paid in proportion to the risk which it assumes, and puts the package in its safe.

If a man wants to store merchandise in safety he pays for so much space in a warehouse; if he wants to put securities in a secure place he pays a good price for a tin box, perhaps two feet long and six inches wide, in a safe deposit vault. In both cases the property is in the hands of a bailee. The difference in the price charged is regulated entirely by the increased care which one bailee agrees to take of the property deposited. That involves greater cost to the bailee, for which the bailor must pay.

The United States government acts upon the same principle in handling the mail. If a man wants his letter to go by the fast mail he must put first class postage upon it. No matter what the urgency, if the letter is sent as third class matter, wrapped up in a newspaper, it receives third class treatment; is delayed in favor of first class mail, and if the address becomes erased it never goes to the dead letter office but is thrown away. If on the other hand a man wants greater speed or security than even first class matter ordinarily receives, he must put a special delivery stamp upon his letter or register it.

The Harter act says that no carrier may not enforce an agreement whereby he shall be "relieved" from liability. But it is quite another thing to say that he is liable to the utmost for all property lost, regardless of its declared value or the price paid for its transportation. That is like transforming the warehouseman into a safe deposit company and still insisting upon warehouse prices.

3. The argument for libellant upon the language of the Harter act, if pressed to its logical conclusion, would require the Court to hold that any valuation placed by the terms of a bill of lading upon the goods shipped would be illegal. For in one sense that valuation, if valid, "relieves" the carrier from liability for any loss

above the amount of the valuation. Why strain the term "relieve," so as to prohibit a reasonable contract, which has been recognized as such throughout the evolution of the law of carriers: when by giving to this word "relieve" a reasonable construction it will remedy the evil which caused the passage of the Act, and do justice to both shipper and carrier.

4. The Court, in construing a statute will consider other acts which are *in pari materia.*

1 Kent Comm., 463.

The Interstate Commerce Law should therefore be considered in this connection. Section 1 enacts that all charges made for any transportation rendered by the carriers to where the act applies, some of whom are ocean carriers, "shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Section 2 provides

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, deed or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any services rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in transportation of the like amount of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The only possible result of the construction under consideration would be to force upon the carrier the necessity of a much higher rate than that now charged for low-class goods, in order that as a whole his rates charged should

be sufficient to compensate him for the liability assumed. Congress certainly could not compel him to carry goods for nothing, and if he cannot by special contract charge a stated sum per ton for goods of the value of one hundred dollars per package, and limit his liability to that amount in case of loss, unless a greater value be declared, and a higher rate of freight paid, he would be forced to make a fixed rate for all goods whatsoever, which would be too high for the cheapest goods carried, as it would also be too low for the most valuable goods. This would be an unfair discrimination in favor of the latter. Such discrimination Congress has uniformly endeavored to prevent.

5. The rule which should guide the Court in the construction of this act is well stated by Chancellor KENT,

1 Kent Comm., 462 :

"The reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity."

This rule has often been applied by this Court.

Oates *vs.* United States, 100 U. S., 239.
Rector Holy Trinity Church *vs.* United States, 143 U. S., 457.
United States *vs.* Laws, 163 U. S., 258.
In re Chapman, 166 U. S., 661.

In the latter case at p. 667 the Court say :

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible, so as to avoid an unjust or an absurd conclusion."

To the same effect are

People *vs.* Lacombe, 99 N. Y., 44.
Railton *vs.* Wood, L. R. 15 App. Ca., 363 (P. C.).
Attorney-General *vs.* Horner, 14 Q. B. Div., 245, 257.

6. For a like reason it is well settled that the Court will always, if possible, adopt that construction of an act which will render it constitutional. The implication must always exist that no violation of the Constitution has been intended by Congress, and that implication will at times even require the Court to lean to the construction which possibly would not seem most obvious and natural, in order that the statute may have effect. It is always to be presumed that Congress did not intend any clause of the act to be a nullity. The construction contended for here by respondent is more obvious and natural than that urged by the appellant. But even if that were not so, the above principles would require the Court to avoid any construction by which any portion of the act should be rendered a nullity.

Sedgwick on Stat. Const. (2 Ed.), 266.
Roosevelt *vs.* Goddard, 52 Barb., 533, 545.
Colwell *vs.* May's Landing W. P. Co., 19 N. J. Eq. (4 C. E. Gr.), 245.
Duncombe *vs.* Prindle, 12 Iowa, 1.
People *vs.* San Francisco, &c., R. R. Co., 35 Cal., 606.
Bigelow *vs.* W. Wis. R. R., 27 Wis., 478, 486.

A notable instance of the application of this rule of construction is to be found in

People *vs.* Cannon, 139 N. Y., 32.

There, in answer to the objection that the act in question (the Bottling Act) deprived the owners of bottles of property without due process of law, the Court construed the statute in opposition to its literal language, but so as to give effect to its general purpose, without infringing upon individual rights.

Tenth.

Congress has no power to prohibit parties from contracting that reward shall be proportionate to risk.

The first section of the Harter Act which makes it unlawful to insert in a bill of lading a clause which altogether exempts a carrier from liability for his negligence is based upon the policy of the common law, as it existed before the Constitution of the United States was adopted, and as it has been expounded by this Court. Some other Courts, it is true, had taken a different view of this policy, and had sustained the validity of contracts exempting carriers from liability for negligence. It was to prevent this conflict for the future and to put all vessels trading to our ports on a footing of equality in this respect that the Harter Act was passed.

But a construction of the first and second sections of that act which would prohibit parties from contracting that the reward shall be proportionate to the risk, rests upon no public policy whatever. No reason can even be suggested why a carrier by sea should be forced to accept any goods offered by a shipper, without a right to require from him a statement as to the value of the goods, and an equal right to charge in proportion to the value so declared.

The same principle which allows such a transaction

between the shipper and the carrier would also allow the carrier to notify all shippers that for goods up to the value of one hundred dollars a specific charge would be made, and that where the value of goods so shipped is not declared to be above one hundred dollars a package, as would usually be the case, such failure to declare the value would be taken as an admission that the goods were not of a greater value, and would leave the shipper the right to prove damage in case of loss up to that amount. The carrier cannot compel the shipper to declare the value, and is entitled to place upon him the risk of loss if he fails to make such declaration, and to pay a proportionate rate.

If any clause in either section of the act can be construed as prohibiting such a contract, the clause to that extent is unconstitutional,

I.—On the ground of unjust discrimination, and that of the worst sort, in favor of the owner of valuable goods and against the owner of goods of less value.

Since our American written Constitutions were first construed by Courts it has always been recognized that neither Congress nor the Legislature of a State has the right to make an arbitrary designation of any class of persons which is to be affected by its legislation, whether such legislation be within the scope of the police power or otherwise.

In State *ex rel.* McCue *vs.* Sheriff of Ramsey Co., Minn., 51 North West Rep., 112, a statute prohibited the emission of dense smoke except from certain manufacturing establishments. The Court held the act unconstitutional for discrimination, saying:

"No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the

nuisance occasioned by dense smoke, but it can make no practical difference in what business the owners or occupants, or the buildings in which such smoke is produced, are engaged."

Granting that the Legislature has the right to prohibit the emission of smoke, it is the smoke against which the act must be aimed, and not against certain individuals, while it exempts other persons whose smoke is equally dense.

In State *vs.* Loomis, 115 Mo., 307, a statute of the State made it unlawful for any corporation, person or firm engaged in manufacturing or mining, to issue any order, check or other token of indebtedness payable otherwise than in money, unless it was redeemable at its face value in cash or goods, at the option of the holder. This Act was held unconstitutional as class legislation The Court said:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that the differences which would serve for classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon statute or color of the hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land. * * They (these sections) undertake to deny to the persons engaged in the two designated pursuits, the right to make and enforce the most ordinary every-day contracts, a right granted to all other persons. This denial of the right to contract is based on a classification, which is purely arbitrary, because the ground of classification has no relation whatever to the natural capacity of the persons to contract."

The language above quoted is very apt. This section of the Harter Act, upon the construction contended for, can only be supported, if there is some reason why the owner of goods of small value should be compelled to pay as much for their carriage as the owner of goods of greater value.

In Ritchie *vs.* The People, 155 Ill., 98, the Court say at page 106:

"Where legislative enactments which operated upon classes of individuals only have been held to be valid, it has been where the classification was reasonable and not arbitrary."

A statute was there held to be unconstitutional for discrimination which prohibited the employment of females in any factory or workshop for more than eight hours a day. The Court held that there was no reason for discriminating between employers in factories or work shops, and merchants or builders or carriers.

In Low *vs.* Rees Printing Co., 41 Nebraska, 127, the Court was construing a statute providing that for all classes of mechanics, servants and laborers, except those engaged in farming or domestic labor, a day's work should not exceed eight hours, and that extra pay must be rendered for all work over that time. The Court held that the statute was unconstitutional on account of its discrimination against farm and domestic laborers, which made it special legislation.

In Frorer *vs.* The People, 141 Ill., 171, the statute provides that wages should be paid only in money, and prohibited persons engaged in mining and manufacturing from keeping "truck stores." The Act was held unconstitutional on account of this discrimination. The Court said (p. 178):

"There is nothing in operating mines and manufactures

to render the individuals employed therein less capable to contract or to give the employer greater wisdom and adroitness therein, than if they were engaged in operating and controling respectively some other branch of industry."

The same principle is re-stated in Ramsey *vs.* The People, 142 Ill., 380.

In Millet *vs.* The People, 117 Ill., 294, a statute which provided that all coal which was mined should be weighed and a record of the weights kept for the inspection of operators and the public, was held unconstitutional. The Court said (page 302):

"What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of labor, or in regard to the mode of ascertaining the price, and why should the owner of the mine or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract?"

It is not necessary to maintain that in each of the cases thus cited, the Court correctly applied the rule for which we contend. The rule itself is what we invoke. It is well stated in

Cooley on Const., Lim., 6th Ed., 484:

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges or legal capacities, in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts or to receive conveyances, or to build

such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their 'pursuit of happiness'; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."

The reasoning which this Court adopted in the cases of Munn vs. Illinois, 94 U. S., 113, and Budd vs. New York, (143 U. S., 517) is in no way applicable to the present case. In those cases statutes were upheld which made a fixed charge for certain fixed services: so much for elevating grain per bushel. The service and its cost for each bushel were identical.

In the case of carriage by sea the service and its cost for goods of largely different character and value are essentially different, and Congress has no power to discriminate as it would do by the requirement that the charge for the less costly service should be as much as that for the more costly service.

Moreover, in the Budd case (p. 547) the Court expressly said that the power to regulate charges could not be exercised "to compel the doing of the services without reward." Now, if the reward for carrying goods worth $100 is adequate, and no more, it is obvious that an act which would compel the carrier to carry goods worth $1,000, for the same reward, would in effect compel him to carry the value of $900, without reward. This, Congress has no power to do.

Covington & Lexington Turnpike Co. *vs.* Sandford, 164 U. S., 578.

II.—The construction contended for would also be unconstitutional as violating the provisions of the fifth amendment of the United States Constitution, in that it would deprive carriers by sea of liberty and property without due process of law. The right to contract in matters which may lawfully form the subject matter of a contract, is both a liberty and a property right, which cannot be denied a man without due process of law.

Commonwealth *vs.* Perry, 155 Mass., 117.

In this case a statute was held unconstitutional, which prohibited employers from contracting with their workmen that a portion of their wages might be deducted on account of imperfect workmanship. At p. 121, the Court say:

"The right to acquire, possess and protect property, includes the right to make reasonable contracts which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business, into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right, which are expressly recognized in our Constitution."

This case is strictly analogous to that at bar. The right to contract that a higher price shall be payable for good work than for bad, is of the same character as the right to contract that a higher price shall be paid for a costly and difficult service than for that which is cheap and easy.

The dissenting opinion of HOLMES, J., in effect, takes

the ground that the workmen might be considered as weak and needing protection, and "that the Legislature had the right to deprive the employers of an honest tool, which they were using for a dishonest purpose."

There can be no pretense of this sort in the case at bar, and it would seem that if a statute bearing the construction now contended for had been before the Supreme Judicial Court of Massachusetts, Mr. Justice HOLMES would have concurred with his brethren in holding it unconstitutional.

The Slaughter Houses cases, 16 Wall., 36, 80, 81, cited by Mr. Justice HOLMES, *held* that the Statute of Louisiana, there under consideration, was a valid exercise of the police power. The business of slaughtering cattle as conducted in 1869, was often dangerous to life and health. The decision of this Court that it could properly be regulated has justified itself. And here let us say, once for all, that we are not called upon to maintain that in each of the cases about to be cited the Court correctly applied the constitutional rule we now invoke. The weak, ignorant and improvident have always been entitled to special consideration in Courts of equity, and Legislatures may constitutionally pass laws reasonably adapted to protect them. But they cannot, under color of this, restrict freedom of contract in cases which do not come within the police power or within the branch of equity jurisdiction just referred to.

The libellant cannot claim special legislation on either ground.

The distinction just stated between valid and invalid legislation, so far as it is affected by the clause of the Constitution now under consideration, is clearly defined in

People *vs.* Ewer, 141 N. Y., 129.

The following cases are illustrations of the application

by various Courts of constitutional provisions similar to that under consideration :

In Ritchie *vs.* The People, 155 Ill., 98, before cited, the Courts say, at page 104 :

The privilege of contracting is both a liberty and property right. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts * * * (page 105). "The right to contract is the only way by which a person can rightfully acquire property by his own labor. Of all the rights of persons it is the most essential to human happiness," Quoting Leep *vs.* St. L., &c., Ry. Co., 58 Ark., 407.

Ex parte Kuback, 85 Cal., 274.

In this case an ordinance of the city of Los Angeles, making it a misdemeanor for any contractor with the city to employ a person to work more than eight hours a day was held unconstitutional.

At p. 275, the Court say :

" It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation ; but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered, because the contract is that he shall work more than a limited number of hours per day."

In Godcharles *vs.* Wigeman, 113 Penn. State, 431, a Pennsylvania statute made void all orders payable in anything but money, given by employers engaged in manufacturing, to their workmen. The Court said of these provisions (p. 437) :

They "are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the Legislature to do what in this country cannot be done, that is, prevent persons who are *sui juris*, from making their own contracts. The Act is an infringement alike of the right of the employer and the employee."

Almost the same language is used in State *vs.* F. V. Coal & Coke Co., 33 W. Va., 188.

In State *vs.* Goodwill, 33 W. Va., 179, a statute was before the Court by which those engaged in mining and manufacturing were prohibited from issuing orders to employees unless payable in money. This Act was held unconstitutional. The Court say (p. 104):

"The right to use buy and sell property, and contract in respect thereto, including contracts for labor, which is as we have seen, property, is protected by the Constitution."

In Ramsey *vs.* The People, 142 Ill., 380, a statute provided that where miners were paid in proportion to the amount of coal mined, the coal must be weighed before being screened. The Act was held unconstitutional. The Court say (p. 386):

"In all other kinds of business involving the employment of labor, the employer and employee are left free to fix by contract the amount of wages paid and the mode in which such wages shall be ascertained and computed. This is justly regarded as a very important right, vitally affecting the interests of both parties. To the extent to which it is abridged, the property right is taken away."

This decision was followed in Braceville Coal Co. *vs.* The People, 147 Ill., 66.

The New York cases are to the same effect:

People *vs.* Gillson, 109 N. Y., 389.
People *vs.* Marx, 99 N. Y., 377.
In re Jacobs, 98 N. Y., 98.

Eleventh.

Deviation.

The appellant argues that the clause in question does not apply to the case at bar, because the loss occurred after the steamer left Savanilla. To this we reply:

1. The recovery is not for a loss incurred by deviation, but for negligence in not making more thorough search for the goods at Savanilla.

Clause 9, of the bill of lading, allows goods to be over-carried. It was inserted with reference to the usual course of business to which reference has been had.

The necessities of proper stowage and distribution of a mixed cargo, and the frequent receipt of goods on the last day of sailing, cause goods to be sometimes necessarily so stowed as to be naturally overlooked or missed at the different ports of call. The ship being under the necessity of delivering mails and passengers with punctuality and despatch, and of avoiding delays that would be destructive to cargoes of perishable fruit, cannot overhaul all its cargo at every port of call.

All carrier's contracts are made with reference to the usage of the trade as to stowage.

Baxter *vs.* Leland, 1 Abb. Adm., 348.
The *Colonel Ledyard*, 1 Sprague, 530.
Barber *vs.* Brace, 3 Conn., 9, 13.

This is admitted in

The *Delaware*, 14 Wall., 579, 598, 606.

Usage in reference to the manner of delivery is binding upon both parties.

Richmond *vs.* Union Steamboat Co., 87 N. Y., 240.

Homesly *vs.* Elias, 66 N. C., 330.
Adams Ex. Co. *vs.* Darnell, 31 Ind., 20.
Salter *vs.* Kirkbride, 4 N. J. Law. Rep., 223 229.
McMasters *vs.* Penn. R. R., 69 Penn., 374.
The *Tybee*, 1 Woods, 358.
Hooper *vs.* Chicago & N. W. R. Co., 27 Wis., 81.
Whitehouse *vs.* Halstead, 90 Ill., 95.

It is also binding when it relates to the method of transportation.

Robertson *vs.* Nat. S. S. Co., 139 N. Y., 416.

In the case at bar, this usage explains clause 9, and shows that it was intended to allow just what happened here. The learned District Judge held that this clause did not constitute a defense because of the carrier's failure to prove diligence in searching for the goods at Savanilla. Assuming, for the argument, that this is a sufficient reply, it still proves that the recovery is because of the negligence and not because of the deviation.

2. The authorities cited as to recovery by the shipper, where there has been a deviation (with one exception, to be considered hereafter), do not touch the effect of clauses limiting the amount of recovery. They do not, on principle. The reason of the decisions on the latter clauses, stated under the Third and Ninth Points, are equally applicable to a loss from deviation. If the appellee had been notified of the actual value of these uniforms, it would have bestowed more care upon the search at Savanilla. All care involves expense, and for expense there should be a proportionate reward.

In Douglas Co. *vs.* Minnesota Transfer Co., 62 Minn., 288, it was held that a clause of this sort was operative to reduce the recovery, although the goods were shipped by the wrong route.

3. The only case cited for libellant on this point is

Ellis *vs.* Turner, 8 Term Rep., 531.

To this there are several replies:

a. The English cases on carriers decided during the last century, have been so modified by the recent decisions that they cannot be cited as authority.

b. In that case there was an express agreement to deliver at the first port of call, and an express and wilful refusal to deliver there. On these two grounds the decision is based.

c. In that case there was no written contract, but only a posted notice, never seen by plaintiff.

4. The argument was much pressed in the Court below, that the effect of the deviation was to vitiate the insurance. This, however, would depend upon the form of the policy. If libellant had insured the goods "with all liberties as per bill of lading," the goods would have been covered notwithstanding the failure to deliver them at Savanilla. This is not an uncommon form of insurance. There are numerous routes in which it is of great importance to the carrier to permit what this bill of lading permits, and it is a very simple matter for the shipper to obtain insurance policies, covering such contingencies, as will under these circumstances occasionally arise.

Insurance is a collateral contract and cannot affect the carrier's liability to the shipper.

The City of Norwich, 118 U. S., 493.
Foley *vs.* Ins. Co., 152 N. Y., 131.

5. In the present case, especially, the limitation was reasonable. The ultimate cause of the loss was that the goods were offered for carriage, too late for proper stowage.

6. The argument on the subject of deviation would be

entitled to more effect if the Court below had held that the respondent was not liable because the proximate cause of the loss was a hurricane, which was, of course, a peril of the sea. The fact of a deviation may make the carrier liable, as the District Court held, but it has no tendency to determine the extent of the liability. There are many other causes which might make the carrier liable. He would be liable for negligence. This liability, however, as we have already shown, may be limited in its amount, and such limitation as to amount in the nature of the case must apply, whatever be the ground of the libel. In short, the argument for libellant fails entirely to discriminate between an exemption from and a limitation of liability. It is not competent, according to the rule of the Federal Courts, for a carrier to exempt himself from liability for negligence. It is competent for him to limit the amount of such liability. Surely the liability for negligence cannot, in the nature of the case, be less onerous than a liability for an unintentional deviation.

7. In examining the cases on this subject a broad distinction will be noticed.

In some of them there was a wilful wrong by the carrier's servants. In some there was an absolute abandonment by the carrier of the contract of carriage. It is held that in either case limitations of liability in the contract of carriage for injury from specified causes, such as storms or fire, do not apply. The case of Ellis *vs.* Turner, cited by appellant is an apt illustration. There was an express and positive agreement to deliver at Stockwith before undertaking the further voyage to Gainsborough. This was made for the express purpose of excluding what appeared to be a frequent practice of delivering on the return from Gainsborough.

In the case at bar, if the shipper had insisted upon striking out the ninth, tenth and eleventh clauses of the bill of

lading, and had demanded the goods at Savanilla, and the Master had there expressly refused to deliver them the cases would be parallel. On the contrary, here is neither,

a. A wilful wrong, nor *b*, an abandonment of the contract.

Assuming there was negligence in its performance (of which, however, there is no positive proof), there was still an endeavor to perform, and all possible diligence was used to rectify the mistake, immediately upon its discovery.

There are, doubtless, general statements in text books, and decided cases which tend to support libellant's theory. But in none of them was there an agreement like that in the present case. In view of the exigencies of the business this certainly was reasonable, and should be enforced.

The construction now contended for was put upon similar language in the English Carriers' Act of 1830. The distinction just stated was held to be well taken by the Court of Appeals affirming the Queens Bench Division.

Morritt *vs.* North Eastern R. Co., L. R., 12 Q. B. Div., 302.

Twelfth.

Evidence as to Negligence.

One fallacy in libellant's argument consists in the assumption that respondent owed a duty to him alone. In fact, however, it owed a duty to the government and the public to deliver the mails promptly, to passengers to land them punctually, and to all the other shippers to cause no unnecessary delay. It had not unlimited time within which to perform these duties. On the contrary

the *Ailsa* was running on schedule time, and was bound to adhere to this schedule as closely as possible.

The anchorage in Savanilla was a mile and a half from the landing, and cargo was landed in lighters. The harbor was a dangerous one (p. 16). Of all these facts the libellant, a regular shipper by this line, is chargeable with notice, and they qualify materially the respondent's obligation to the libellant, in reference to the time which the letter might require to be devoted in the roadstead at Savanilla to a search for his packages.

In short, negligence involves the idea of a violation of duty, and duty is measured by the existing circumstances. Under these circumstances the respondent is not chargeable with negligence, for not delaying at Savanilla to hunt up the libellant's packages.

On the other hand it is undisputed that libellant sent his goods on board just before sailing, when methodical stowage would necessarily be more difficult. This certainly contributed to the loss.

Wherever the shipper's negligence concurs with that of the carrier, and both contribute to the loss, the shipper cannot recover. Much more can he not recover, where, as in this case, there is no proof of respondent's negligence.

Erie R. Co. *vs.* Wilcox, 84 Ill., 239.
Hart *vs.* Chicago & N. W., 69 Iowa, 485.
Thomas *vs.* Ship *Morning Glory* 13 La. Ann., 269.
Northern *vs.* Williams 6 *Ibid.*, 578.

Thirteenth.

The decree of the Circuit Court of Appeals should be affirmed with costs.

EVERETT P. WHEELER,
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